

Letter of Findings: 04-20130161
Gross Retail Tax
For the Years 2009, 2010, and 2011

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ISSUE

I. Diesel Fuel Sales – Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-2-1(b); IC § 6-2.5-7-3(b); IC § 6-8.1-5-1(c); IC § 6-2.5-8-8; IC § 6-2.5-8-8(a); IC § 6-2.5-9-3; Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-8-12](#); [45 IAC 2.2-8-12\(d\)](#); [45 IAC 2.2-8-12\(f\)](#).

Taxpayer argues that it sold diesel fuel to customers exempt from sales tax and the information Taxpayer provided is sufficient to establish each customers' exempt status.

STATEMENT OF FACTS

Taxpayer operates a combination gas station/convenience store. Taxpayer sells both gasoline and diesel fuel. The convenience store sells food, candy, newspapers, lottery tickets, tobacco products, and the like.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records. The audit found that Taxpayer sold diesel fuel without charging sales tax. Taxpayer did not obtain exemption certificates from its customers.

The audit resulted in the assessment of additional sales tax. Taxpayer disagreed and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Diesel Fuel Sales – Gross Retail Tax.

DISCUSSION

In the absence of customer exemption certificates, the audit employed a projection to determine the amount of exempt diesel fuel sales. Taxpayer "agreed to project the sales tax liability for these issues" and signed an agreement (Form AD-10A) to that effect. The "projection computation" is described as follows:

Taxable Diesel Sales were discovered where sales tax was not charged or collected and a valid exemption certificate was not on file. Additional taxable [diesel] sales for the months reviewed were totaled and divided by the exempt diesel sales for the 3 months sampled as reported on the ST-103MP's. This resulted in an error percentage. The error percentage was then applied to the total exempt sales reported to arrive at the additional taxable diesel sales.

However, Taxpayer protested the results and explained that it maintained a complete list ("fuel log") of the trucking companies with which it had conducted diesel fuel business. The list contained the names of each purchasing company, the Department of Transportation ("DOT") number, the credit card type (Visa, Master Card, etc.) and the driver's signature. Taxpayer explains it made subsequent attempts to obtain tax exemption certificates from its customers, that its customers are upset about being asked for the exemption certificates, and that its disaffected customers are now purchasing diesel fuel from one of its various competitors. Taxpayer states that it is the only diesel fuel vendor which is being asked by the Department to obtain tax exemption certificates.

Taxpayer concludes:

The documents provided to the audit standing alone should have been sufficient proof that the sale[s] made to truckers for interstate commerce does qualify exempt sales for purposes of Sales and Use Tax.

It should be noted at the outset, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a gross retail (sales) tax on retail transaction and imposes on the vendor responsibility for collecting the tax. IC § 6-2.5-2-1 provides as follows:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

Exempt entities may avoid paying the sales tax by presenting the vendor a valid exemption certificate. IC §

6-2.5-8-8 states:

- (a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.
- (b) The following are the only persons authorized to issue exemption certificates:
 - (1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;
 - (2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and
 - (3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.
- (c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt. (Emphasis added).

[45 IAC 2.2-8-12](#) imposes certain limitations on the use of the exemption certificate and imposes on the vendor responsibility for either collecting the tax or obtaining the certificate.

- (a) Exemption certificates may be [issued] only by purchasers authorized to issue such certificates by the Department of Revenue. Retail merchants, manufacturers, wholesalers and others who must register with the Department of Revenue and who qualify to purchase exempt from tax under this Act [\[IC 6-2.5\]](#) may issue exemption certificates with respect to exempt transactions. All persons or entities not required to register with the Department as retail merchants, manufacturers, or wholesalers, and who are exempt under this Act [\[IC 6-2.5\]](#) with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transaction provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption number.
- (b) Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.
- (c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.
- (d) Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.
- (e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.
- (f) An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.
- (g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.
- (h) Exemption certificates may be reproduced provided no change is made in the wording or content. (Emphasis added).

Therefore, as provided by IC § 6-2.5-8-8(a), a vendor such as Taxpayer accepting a valid exemption certificate has no duty to collect or remit the state gross retail or use tax on a purchase. However, as provided in [45 IAC 2.2-8-12](#)(f), an exemption certificate issued by a purchaser is not valid unless it is executed in the prescribed and approved form and unless all information requested on the form is completed.

In the absence of valid exemption certificates, [45 IAC 2.2-8-12](#)(d) makes it clear that Taxpayer bears the burden of proving that sales tax was remitted to the State or that Taxpayer's customers did indeed use the diesel fuel for exempt purposes.

IC § 6-2.5-7-3(b) specifically requires retail merchants who sell special fuel from metered pumps such as Taxpayer and other retailers to collect exemption certificates from their customers when they make exempt sales. In the absence of exemption certificates, the sales are deemed taxable:

- (a) With respect to the sale of gasoline which is dispensed from a metered pump, a retail merchant shall collect, for each unit of gasoline sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent (\$0.001), of:
 - (1) the price per unit before the addition of state and federal taxes; multiplied by
 - (2) seven percent ([percent]).

The retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under [IC 6-2.5-5](#).

(b) With respect to the sale of special fuel or kerosene which is dispensed from a metered pump, unless the purchaser provides an exemption certificate in accordance with [IC 6-2.5-8-8](#), a retail merchant shall collect, for each unit of special fuel or kerosene sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent (\$0.001), of:

(1) the price per unit before the addition of state and federal taxes; multiplied by

(2) seven [percent].

Unless the exemption certificate is provided, the retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under [IC 6-2.5-5](#). (Emphasis added).

The language of IC § 6-2.5-7-3(b) is unequivocal in its requirement that Taxpayer collect exemption certificates for Taxpayer's exempt sales of diesel fuel.

However, Taxpayer believes its "Fuel Log" is an entirely satisfactory substitute for the missing exemption certificates. Taxpayer's "Fuel Log" is a record of transactions but does not establish which are exempt and which are not exempt. Taxpayer assumes that any vehicle which purchases diesel fuel is a public transportation company or agricultural business engaged in "interstate commerce" and presumptively entitled to the exemption.

The Department must disagree with Taxpayer's argument. The Department is unable to agree that every vehicle which consumes diesel fuel is exempt. Common experience would seem to indicate that certain diesel-powered vehicles are not engaged in "public transportation," agricultural activities, or engaged in another exempt activity. Moreover, the law is clear that vendors of special fuel are required to collect sales tax on each transaction in the absence of a valid exemption certificate and is then required to hold "the tax as agent for the state." IC § 6-2.5-2-1(b). (The retail merchant "holds . . . taxes in trust for the state and is personally liable for the payment of those taxes" IC § 6-2.5-9-3).

Having failed to meet its responsibility of obtaining the necessary exemption certificates, Taxpayer has failed to meet its statutory responsibility of demonstrating that the proposed assessment is "wrong." IC § 6-8.1-5-1(c). Therefore, Taxpayer is now "personally liable" for the uncollected taxes.

FINDING

Taxpayer's protest is respectfully denied.

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